SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

DATE: March 21, 1996 Revised: _____ _____ _____

SUBJECT: Administrative Procedure Act

	Analyst	Staff Director	Reference	Action
1.	Rhea	Wilson	GO	Favorable/CS
2.			WM	Withdrawn
3.			RC	Withdrawn
4.				
5.				

I. Summary:

The committee substitute would reorganize the Administrative Procedure Act. As well, it would: (1) require an agency to file a notice of rule development; (2) require an agency to consider the impact of a rule on small counties and cities; (3) require an agency to prepare a statement of estimated regulatory costs under certain circumstances; (4) change rule challenge standards; (5) require payment of attorney fees to challengers of existing and proposed rules found to be invalid unless the agency was substantially justified; (6) requires adoption of uniform rules; and (7) authorizes waiver and variance of rules.

The committee substitute would amend sections 11.60; 120.52; 120.525; 120.53; 120.532;120.533; 120.535; 120.54; 120.545; 120.55; 120.56; 120.565; 120.57; 120.60; 120.62; 120.63; 120.65; 120.655; 120.66; 120.71; 120.68; 120.69; and 120.72, Florida Statutes.

The committee substitute would create sections 11.0751; 120.541; 120.542; 120.569; 120.573; 120.574; 120.595; 120.80; and 120.81, Florida Statutes.

The committee substitute would repeal sections 120.543; 120.575; 120.58; 120.59; 120.61; 120.633; 120.70; 120.721; and 120.722, Florida Statutes.

II. Present Situation:

Chapter 120, F.S., the Administrative Procedure Act (APA), governs agency adjudication and rulemaking.[1] When an agency conducts investigations, grants or denies licenses or permits, and disciplines employees and licensees, it is performing executive functions. The Legislature, however, may delegate to an agency the power to adopt rules. When an agency promulgates rules, the agency performs a quasi-legislative function.

Rulemaking is not a matter of agency discretion. Section 120.535(1), F.S., provides that each agency statement which meets the definition of a rule[2] must be adopted as a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless an agency can prove otherwise.

Generally, agencies are "accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties."[3] Further, ". . . the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations."[4]

Recently, the First District Court of Appeal held that ". . . it is an established principle that where the empowering provision of a statute states simply that an agency may make such rules and regulations as may be necessary to carry out the provisions of this act, the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious."[5]

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[1]An agency is: (a) the Governor when exercising executive powers which are not constitutionally derived; (b) each state officer and state department, departmental unit, commission, regional planning agency, board, district, and authority; and (c) each unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to the APA by general or special law or existing judicial decisions. The APA does not apply to the Legislature or to the courts.

[2]Section 120.52(16), F.S., defines a rule as an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure or practice requirements of an agency . . . ." The term includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The amendment or repeal of a rule is also included in the definition.

[3]Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1 DCA, 1984).

[4]Dept. of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1 DCA 1983).

[5]Dept. of Labor and Employment Security v. Bradley, 636 So.2d 802 at 807 (Fla. 1 DCA, 1994).

Additionally, the authority to adopt rules may be "fairly implied" from several statutory sections when coupled with the authority to adopt such rules as the agency deems necessary to effectively administer and enforce the law, consistent with the legislative intent.[6]

An agency often devotes substantial amounts of time formulating, drafting, and revising a proposed rule before a rule is adopted. Public participation in the formulation of rules is encouraged and, as a result, public notice is emphasized in the APA. Generally, notice must be published in the Florida Administrative Weekly (FAW).

Section 120.54(1)(c), F.S., authorizes, but does not require, an agency to advise the public that it is developing a rule by publishing a notice of rule development in the FAW. The notice of rule development provides information about the subject, purpose and effect, the legal authority and, if it is available, the preliminary text, of the rule under development.

As well, an agency is given the option of conducting a public workshop to develop a rule. Section 120.54(1)(d), F.S., provides, however, that if an agency opts to publish a notice of rule development and a person who will be affected by the rule requests the agency to conduct a workshop, the agency must do so, even if the agency had not originally intended to conduct a workshop. The agency must publish notice of a rule development workshop in the FAW no less than 14 days prior to the date of the workshop.

The APA also requires an agency to consider specific impacts of a proposed rule. One such impact that must be considered is the effect a proposed rule will have on small business.[7] In order to reduce the impact of a rule on small businesses, an agency must consider, among other methods, whether less stringent compliance or reporting requirements or whether performance standards instead of design or operational standards, would minimize the rule's impact. Whenever possible, s. 120.54(2)(a), F.S., requires an agency to avoid regulating businesses which do not contribute significantly to the problem a rule is designed to regulate and to tier a rule to reduce disproportionate impacts.

If a proposed rule will affect small business, s. 120.54(3)(b), F.S., requires an agency to notify the Small and Minority Business Advocate, the Minority Business Enterprise Assistance Office, and the Division of Economic Development of the Department of Commerce, not less than 21

[6]General Motors Corporation v. Florida Dept. of Highway Safety and Motor Vehicles, 625 So.2d 76 at 78 (Fla. 1 DCA, 1993)

[7]Section 288.703, F.S., defines "small business" to mean an independently owned and operated business concern that employs 100 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $3 million and an average net income after federal income taxes, excluding any carryover losses, for the preceding 2 years of not more than $2 million. For sole proprietorships, the $3 million net worth requirement includes both business and personal investments. The APA authorizes an agency to define a small business to include more than 50 persons if it finds that this is necessary to adapt a rule to the concerns of small business (this should be amended to 100 to reflect the change in the definition of small businesses).

days prior to adoption. These entities are authorized to offer alternatives which would reduce the impact on small businesses. If the proposed alternatives reduce the impact, an agency must adopt them if they are feasible and consistent with the proposed rule. If an agency does not adopt the proposed alternatives, it must file a written explanation of its reasons for not doing so with the Joint Administrative Procedures Committee and with the entities which proposed the alternatives.

Additionally, an agency may, and in some instances must, consider the economic impact of its proposed rule by preparing an economic impact statement (EIS).[8] While an agency may prepare an EIS prior to adopting, amending or repealing a rule, it must prepare an EIS under certain circumstances. If the agency determines that the adoption, amendment or repeal of a rule would result in a substantial increase in costs or prices paid by consumers, individual industries, or state or local government agencies, or would result in significant adverse effects on competition, employment, investment, productivity, innovation, or international trade, and alternative approaches to the regulatory objective exist which are not precluded by law, the agency must prepare an EIS.

An agency also must prepare an EIS when requested to do so by certain persons within certain time frames. If the Governor, a body corporate and politic, at least 100 people signing a request, or an organization representing at least 100 persons, or any domestic nonprofit corporation or association requests the preparation of an EIS within 14 days after publication of a notice of rule development or within 21 days after publication of a notice of intent to adopt, amend, or repeal a rule, then an agency must prepare the EIS.

While an agency is not required to publish a notice of rule development, it is required to publish notice of its intent to adopt, amend, or repeal a rule by s. 120.54(1), F.S.[9] The notice must include a short and plain explanation of the purpose and effect of the proposed rule and the specific legal authority under which it is authorized. The notice must be mailed to all persons named in the proposed rule, to all persons who have requested that the agency provide them with advance notice, and to the Joint Administrative Procedures Committee.

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[8] An EIS is required to contain: (1) an estimate of the cost to the agency, and to any other state or local governments, of implementing and enforcing the proposed rule, including the estimated paperwork, and anticipated effects on state or local revenues; (2) an estimate of the cost or the economic benefit to all persons directly affected by the proposed rule; (3) an estimate of the impact of the proposed rule on competition and employment, if applicable; (4) an analysis of the impact on small business; (5) a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of not adopting the rule; (6) a determination of whether less costly or less intrusive methods exist; (7) a description of reasonable alternative methods, where applicable, which were considered by the agency, and a statement of the reasons for rejecting those alternative; and (8) a statement of the data and methodology used in making the estimates.

[9] This notice must be published in the FAW not less than 28 days prior to adoption, amendment, or repeal of a rule.

Section 120.54(3), F.S., requires an agency to give affected persons an opportunity to present evidence and argument regarding a proposed rule to inform the agency of their contentions. Evidence and argument may be presented in writing or an affected person may request that a public hearing be held. The agency must hold the rulemaking hearing if the request is made within 21 days after the notice of intent to adopt a proposed rule is published. Proceedings under this section are legislative in nature, not adversarial. Any pertinent material submitted to an agency within 21 days after the notice is published or submitted at the public hearing must be considered by the agency and made a part of the record of the rulemaking proceeding.

When a person is participating in a rulemaking proceeding under s. 120.54(3), F.S., and that person has substantial interests which will be affected by those proceedings, that person is entitled to a proceeding conducted in a manner that adequately protects those substantial interests. If the rulemaking proceeding does not provide the procedural protection necessary to protect those interests, and the agency agrees that the procedures are not adequate to protect those interest, the asserting person may be permitted to "draw out" of the rulemaking proceeding and begin a separate proceeding under s. 120.57, F.S. Similarly situated persons may be requested to join and participate in the separate proceeding. The original rulemaking hearing is permitted to resume upon the conclusion of the separate proceeding.

Section 120.54(4), F.S., authorizes any substantially affected person to seek an administrative determination of the invalidity of any proposed rule on the ground that it is an invalid exercise of delegated legislative authority.[10] Section 120.56, F.S., permits any person substantially affected by an existing rule to seek an administrative determination of the invalidity of the rule on the same grounds. In the case of a proposed rule, the request seeking a determination must be in writing and must be filed with the Division of Administrative Hearings (DOAH) within 21 days after the date of publication of the notice of intent to adopt a proposed rule. In a challenge either to a proposed or existing rule, the request must state with particularity the provisions of the rule or economic impact statement alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging the proposed or existing rule would be or is substantially affected by it.

Upon receipt of the petition, DOAH is required to forward copies to the agency, the Department of State, and the JAPC. If the director of DOAH determines that the petition complies with statutory requirements, a hearing officer must be assigned within 10 days after receipt of the

[10]Section 120.52(8), F.S., defines an "invalid exercise of delegated legislative authority" to mean action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply: (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54; (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7); (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7); (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or (e) The rule is arbitrary or capricious.

petition. The hearing officer must conduct a formal hearing within 30 days of assignment unless the petition is withdrawn. The agency and the person requesting the hearing are adversary parties. Other substantially affected persons may join the proceeding as parties or intervenors on terms which will not substantially delay the proceedings.

In rule challenge proceedings, the burden of proof falls on the person challenging the validity of a rule to show that the rule is not ". . . reasonably related to the purpose of the enabling legislation . . ." and that the rule is ". . . arbitrary or capricious."[11] Agency rulemaking is entitled to deference and agency rules are presumed to be valid until invalidated in a rule challenge.[12]

Persons successfully challenging agency rules are not automatically entitled to an award of costs or attorneys fees under the APA. In the absence of an applicable statutory provision, an award of costs or fees can only be made under the courts' general discretionary authority to make such an award if the challenged agency action was a "gross abuse of the agency's discretion."[13] Moreover, even where a statute provides that a court "may" award costs and fees, ". . . courts should be reluctant to impose fees and costs against an agency if, for example, the agency's order is reversed only because it erroneously interpreted a provision of law. . . ."[14]

The hearing officer must render a decision within 30 days after the conclusion of the rule challenge hearing. The hearing officer's order is final agency action. The proposed or existing rule may be declared wholly or partly invalid by the hearing officer. Upon such a decision, the agency may not adopt the proposed rule or, if the rule is existing, must give notice of the decision in the first available issue of the FAW.

In addition to public participation and the opportunity for workshops during the rule development process, consideration by an agency of the economic and business impacts of a proposed rule, presentation of evidence and argument by affected persons, the opportunity for affected persons to request a public hearing on a proposed rule, and the right of substantially affected persons to challenge proposed or existing rules, the APA also provides for legislative oversight of rules. The Joint Administrative Procedures Committee (JAPC) is created in s. 11.60, F.S., as a legislative check on legislatively-created authority. The JAPC is a joint standing legislative committee composed of six members, with three members from each house. The JAPC is assigned the duty of maintaining a continuous review of administrative rules and the statutory authority on which they are based.

[11]General Telephone Co. of Florida v. Florida Public Service Commission, 446 So.2d 1063, 1067 (Fla. 1984).

[12]Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1 DCA 1978); City of Palm Bay v. State, Department of Transportation, 588 So.2d 624 (Fla.. 1 DCA 1991).

[13]Greynolds Park Manor, Inc. v. Department of Health and Rehabilitative Services, 491 So.2d 1157, 1160 (Fla. 1 DCA, 1986).

[14]City of Ocoee v. Central Fla. Professional Firefighters Assoc., 389 So.2d 296, 300 (Fla. 5 DCA).

Section 120.54(11)(a), F.S., requires an agency to furnish the following documents to the JAPC at least 21 days prior to rule adoption: (1) a copy of the proposed rule; (2) a detailed written statement of the facts and circumstances justifying the proposed rule; (3) a copy of the economic impact statement, if required; (4) a statement of the extent to which the proposed rule establishes standards more restrictive than federal rules, or that a federal rule on the same subject does not exist; and (6) a copy of the notice of intent to adopt, amend, or repeal a rule.

The JAPC conducts a review on all proposed rules to determine whether: (a) the rule is an invalid exercise of delegated legislative authority; (b) the statutory authority for the rule has been repealed; (c) the rule reiterates or paraphrases statutory material; (d) the rule is in proper form; (e) the notice given prior to adoption was sufficient to give adequate notice of the purpose and effect of the rule; (f) an EIS was prepared, if required; (g) the rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements; (h) the rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule; (j) the rule could be made less complex or more easily comprehensible to the general public; (k) the rule reflects the approach to the regulatory objective involving the lowest net cost to society to the degree consistent with the provisions of law which the rule implements; (l) the rule will require additional appropriations; and (m) if the rule is an emergency rule, there exists an emergency justifying the rule, whether the agency has exceeded the scope of its statutory authority, and whether the emergency rule was promulgated in the manner required.

If the JAPC objects to a rule, it must certify the objection to the agency within 5 days of the objection. The JAPC also must notify the Speaker of the House of Representatives and the Senate President of any objection concurrent with certification to the agency.

Upon receipt of the objection, an agency must: (a) modify the proposed rule to meet the JAPC's objection; (b) withdraw the proposed rule; or (c) refuse to modify or withdraw the proposed rule. If the objection is to an existing rule, the agency must notify the committee that: (a) it has elected to amend the rule to meet the objection; (b) it has elected to repeal the rule; or (c) it refuses to amend or repeal the rule.

If an agency elects to modify a proposed rule to meet the objection, after modification, it must give notice in the first available issue of the FAW. If an agency elects to amend an existing rule to meet an objection, it must notify the JAPC in writing and initiate the amendment procedure by giving notice in the next available issue of the FAW. The agency must complete the amendatory process to an existing rule under these circumstances within 90 days.

If the agency refuses to modify, amend, withdraw, or repeal a rule to which the JAPC has filed an objection, the JAPC must file a detailed notice of its objection with the Department of State. The department must publish this notice in the FAW and in the Florida administrative Code (FAC). The JAPC may not require the agency to meet its objection. The JAPC, however, may

seek an administrative or judicial determination that a rule to which it has filed an objection is an invalid exercise of delegated legislative authority.[15]

Section 120.55, F.S., requires the Department of State to publish in a permanent compilation all rules adopted by each agency. This compilation of rules is entitled the "Florida Administrative Code (FAC)." The publication is the official compilation of the administrative rules of the state. The FAC must cite the specific rulemaking authority pursuant to which each rule was adopted, all history notes, and complete indexes to all rules contained in the code. Supplementation is required to occur at least monthly.

The Department of State is required by s. 120.55(1)(a)1., F.S., to contract with a publishing firm for the publication of the FAC. The department, however, retains responsibility for the FAC. Currently, DARBY Printing Co., of Atlanta, Georgia has contracted with the department to print the FAC. According to the department, the department has held a copyright to the FAC since 1987.

Copyright protection is provided, under 17 U.S.C. s. 102(a) of the Federal Copyright Act of 1976 for original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The federal government is the only entity excluded from copyright under 17 U.S.C. s. 105. Copyright is permitted for works of states and state agencies.[16] The copyright law allows each state to decide which of its own products may be copyrighted. While a state may decide which of its works may be copyrighted, the Copyright Act provides that federal law preempts any state-created rights within the general scope of copyright.[17]

Florida does not have a general copyright law, but provides copyright authority to various agencies and for specific works.[18] Section 286.031, F.S., provides that the Department of State is

[15] To date, the JAPC has not sought either an administrative or judicial determination regarding the validity of an objectionable rule which the agency has refused to amend, modify, or repeal. While the JAPC has not filed an administrative or judicial petition for a rule to which it has voted an objection, it should be noted that only a very small number of rules to which JAPC votes objections ultimately are not amended, modified, or repealed, according to statistics provided by the JAPC.

[16] National Conference of Bar Examiners v. Multi State Legal Studies, Inc., 495 F.Supp. 34 (1980, ND I11).

[17] 17 U.S.C. s. 301.

[18] Copyright authorization presently is provided for agency-created data processing software in s. 119.083(2), F.S.; for state universities in s. 240.299, F.S.; the Department of Lottery in s. 24.105(11), F.S.; the Department of Citrus in s. 601.101, F.S.; the Department of Education in s. 233.255, F.S.; community college boards of trustees in s. 240.319(3)(j), F.S.; agricultural cooperative marketing associations in s. 618.07(9), F.S.; the Institute of Phosphate Research in s. 378.101(2)(a), F.S.; and the Real Estate Commission in s. 475.04(3), F.S.

authorized to secure letters patent and obtain copyright and trademark on any invention, and to enforce its rights. Additionally, the department is authorized to take any action necessary, including legal actions, to protect copyrights against improper or unlawful use or infringement, and to enforce the collection of any sums due the state. Finally, the section provides that the department may do any and all other acts necessary and proper for the execution of its powers and duties under the provision for the benefit of the state.

Section 120.55(1)(b), F.S., requires the Department of State to publish the FAW. The publication contains notices of rule adoption, an index to rules filed during the preceding week, hearing notices required by s. 120.54(1), F.S., notices of meetings, hearings, and workshops conducted in accordance with the provisions of s. 120.53(1)(d), F.S., and summaries of objections to rules filed by the JAPC during the preceding week, among other items. The department is authorized, but not required, to contract with a publishing firm for publication of the FAW.

Section 120.55(5)(d), F.S., provides that it is the intent of the Legislature that the FAW be supported entirely from funds collected for subscriptions to and advertisements in the publication. Section 120.55(1)(e), F.S., requires the department to make copies of the FAW available on an annual subscription basis computed to cover a pro rata share of 50 percent of the costs related to its publication. Each agency which uses the FAW is charged a space rate computed to cover a pro rata share of 50 percent of the costs related to the FAW.

The Department of State is required to furnish the FAW, without charge to each federal and state court having jurisdiction over Florida residents; each state university library; the Legislative Library; each depository library designated pursuant to s. 257.05, F.S.; each standing committee of the Senate and House of Representatives; and each state legislator upon request of the Senate President's office or House Speaker's office. Additional free copies must be distributed, as follows: two subscriptions to each state department; three subscriptions to the library of the Supreme Court of Florida, the library of each state district court of appeal, the Division of Elections, the library of the Attorney General, each law school library in Florida, the Secretary of the Senate, and the Clerk of the House; ten subscriptions to JAPC; and one copy to each clerk of the circuit court and each state department, for posting for public inspection.

Section 120.55(5)(a), F.S., creates the Publication Revolving Trust Fund of the Department of State in the State Treasury. All fees and moneys collected by the department under ch. 120, F.S., are deposited in the revolving trust fund for the purpose of supporting the publication and distribution of the Florida Administrative Code and the Florida Administrative Weekly, as well as for associated costs incurred by the department. Section 120.55(5)(c), F.S., provides that the unencumbered balance in the revolving trust fund at the beginning of each fiscal year may not exceed $100,000. Any amount in excess of $100,000 at the beginning of the fiscal year reverts to the General Revenue Fund.

III. Effect of Proposed Changes:

A. Increased Legislative Oversight

1. Legislative Consideration of Rulemaking Prior to Enacting Law

Section 1. of the committee substitute (page 8, lines 9-16) would require the Legislature, prior to adopting general or special law, to consider what rules would be required by legislation and to determine whether the legislation provides adequate standards to direct the agency when adopting rules. No general or special law would be invalid for failure to comply with the provisions of the section. *This was not in CS/CS/SB 536 as it finally passed, though it was in the original bill.*

2. Additional Reporting Requirements for the JAPC

Section 11.60(2)(f), F.S., currently requires the JAPC to file an annual report with the Legislature. Section 2. of the committee substitute (page 8, line 17 to page 9, line 2) would require the inclusion of additional information in the report. Specifically, the JAPC would be required to report how many times in the previous year it: (a) voted objections to rules; (b) voted to suspend rules; (c) filed administrative determinations on the invalidity of a proposed or existing rule; and (d) filed petitions for judicial review on the invalidity of a proposed or existing rule. The report also would be required to include the outcome of any actions taken. *This provision is identical to CS/CS/SB 536.*

3. Systematic Review of Process and Statutes by the JAPC

Section 2. of the committee substitute (page 9, lines 16 to page 10, line 2) would create a requirement that the JAPC maintain a continuous review of the rulemaking process, including a review of agency procedures and of complaints based on such procedures. Additionally, the committee substitute would create a requirement that the JAPC establish measurement criteria to evaluate whether agencies are complying with legislative authority in adopting and implementing rules. *This provision is identical to CS/CS/SB 536.*

As well, the committee substitute (page 9, line 22 to page 10, line 2) would require the JAPC to undertake a systematic and continuous review of statutes that authorize agencies to adopt rules. As part of this systematic review process, the JAPC would be required to make recommendations to standing committees of the Legislature as to the advisability of considering changes to delegated legislative authority to adopt rules in specific circumstances. Additionally, the committee substitute would require the annual report by the JAPC to include a schedule for the required systematic review of existing statute, a summary of the status of the review, and any recommendations provided to the standing committees during the preceding year. *This provision is identical to CS/CS/SB 536.*

4. Clarifying JAPC Judicial Review Authority

Section 2. of the committee substitute (page 9, lines 3-15) would amend s. 11.60(2)(k), F.S., which provides that the JAPC has standing to seek administrative and judicial review on behalf of the Legislature or the citizens regarding the validity or invalidity of any administrative rule to which the committee has voted an objection which has not been withdrawn, modified, repealed,

or amended to meet the objection. The committee substitute would delete the reference to administrative standing. As well, the section would be amended to limit to 60 days the amount of time the Governor and agency head have to consult with the JAPC regarding an objection. *This provision is identical to CS/CS/SB 536.*

5. Temporary Suspension of Rules

Subsection (10) of Section 14. of the committee substitute (page 57, line 29 to page 60, line 5) would provide for the review of proposed and existing rules by the JAPC. The bill would authorize the JAPC to submit to the Senate President and Speaker of the House a recommendation that legislation be introduced to modify or suspend the adoption of a proposed rule, or amend or repeal a rule, or portion thereof. The JAPC would be authorized to request an agency to temporarily suspend the rule or the adoption of the proposed rule pending its review by the Legislature. *This provision is identical to CS/CS/SB 536.*

6. Systematic Review of and Report on Rules by Agencies

Subsection (2) of Section 9. of the committee substitute (page 25, line 22) would require each agency, by July 1, 1997, to provide to JAPC a list of each rule, or portion of a rule, which was adopted by the agency before July 1, 1996, which exceeds the rulemaking authority permitted by the section. The JAPC would be required to combine the lists and provide a cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature would be required to consider whether specific legislation authorizing the identified rules, or portions of the rules, should be enacted during the 1998 regular session.

Each agency (page 26, line 4) would be required to begin proceedings, by no later than January 1, 1999, to repeal each rule or portion of a rule which has been identified as exceeding the rulemaking authority permitted by the section for which the Legislature has not adopted authorizing legislation.

By February 1, 1999, the JAPC would be required to submit to the Legislature a report identifying those rules that had been identified as exceeding legislative authority for which proceedings to repeal the rule had not been initiated.

Beginning July 1, 1999, the JAPC or any substantially affected person could petition an agency to repeal any rule, or portion of a rule, because it exceeds the rulemaking authority permitted.

Subsection (3) of Section 9. of the committee substitute (page 26, line 25) would prohibit, prior to July 1, 1999, a rule challenge to any rule adopted before July 1, 1996, on the grounds that it exceeds the rulemaking authority or law implemented as described by s. 120.534, F.S. Subsection (4) of this section would provide that nothing in the section could be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid. The provisions of the section are identical to those in CS/CS/SB 536.

B. Rulemaking Authority

1. No Rulemaking Discretion

Section 120.535, F.S., would be repealed (page 25, lines 6 and 7), but the requirements of the section would be included as s. 120.54(1)(a), F.S. Paragraph (a) of the section (page 27, line 19) would continue to provide that rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under the APA would be required to be adopted as soon as feasible[19] and practicable.[20] While CS/CS/SB 536 would have repealed s.120.535, F.S., the same standard was placed elsewhere; in effect, there is no difference between the committee substitute and CS/CS/SB 536 as to this standard.

2. Specific Law Needed to Adopt Rule

Section 9. of the committee substitute (page 25, lines 10-13) would provide that an agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. As well, the provision states that an agency may not adopt a rule based on the sole justification that it is reasonably related to the purpose of the enabling statute and is not arbitrary and capricious. Under the provision, statutory provisions setting forth general legislative intent or policy do not constitute sufficient authority for a rule. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute. *This section is similar to CS/CS/SB 536.*

Subsection (3) of Section 9. of the committee substitute (page 26, line 25) would require that all proposed rules or amendments to existing rules filed after July 1, 1996, be based on rulemaking authority no broader than that permitted by the section. The section would prohibit a challenge to a rule adopted before July 1, 1996, on the ground that it exceeds the rulemaking authority set forth in the section, before July 1, 1999. *This provision is identical to CS/CS/SB 536.*

[19] Under current statute, as well as the committee substitute, rulemaking is presumed feasible unless the agency proves that: (a) the agency has not had sufficient time to acquire knowledge and experience reasonably necessary to address a statement by rulemaking; (b) related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; (c) the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

[20] Currently, as well as under the bill, rulemaking is presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: (a) detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or (b) the particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

3. Flexibility

Section 120.542 of the committee substitute (page 50, line 4 to page 52, line 29) would be created to delegate specific waiver and variance authority to agencies. The section states:

> Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. The section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

The section would authorize an agency to grant a waiver or variance: (1) when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means; and (2) when application of a rule would create a substantial hardship[21] or would violate principles of fairness.[22]

The section would require the Administration Commission to adopt model rules of procedure for granting or denying petitions for variances and waivers. The model rule would be permitted to include procedure for the granting or denial of emergency and temporary variances and waivers, as well as expedited time frames.

Agencies also would be required to advise persons of the availability of variances and waivers.

The committee substitute would require the person who is subject to the rule and who wants a variance or waiver to file a petition with the agency. The section (page 51, lines 15-26) requires a petition to specify: (a) the rule from which a variance or waiver is requested; (b) the type of action requested; (c) the specific facts that would justify a waiver or variance; and (d) the reason why the variance or the waiver requested would serve the purposes of the statute.

The agency would have 15 days after receipt of a petition to provide notice to the Department of State (page 51, line 27 to page 52, line 16). Notice of the petition would be required to be published in the FAW. Interested persons could provide comments. The agency would be required to grant or deny a petition within 90 days of receipt. The order granting or denying the petition would be required to contain a statement of relevant facts and reasons supporting the

[21] The term “substantial hardship” would be defined to mean a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

[22] The term “principles of fairness” would be defined to be violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

agency's action. The decision also would be required to be based upon competent, substantial evidence, and would be subject to challenge.

Agencies would be required to maintain a record of the type and disposition of each petition for waiver or variance which is filed (page 52, lines 17-28). Each agency would be required to file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed, and the disposition of each. *This section was not contained in CS/CS/SB 536.*[23]

C. Rulemaking Procedural Requirement Changes

Sections 10. and 11. of the committee substitute (page 27, line 12 to page 50, line 3) provide a substantial revision to the current rulemaking provisions of APA which are contained in s. 120.54, F.S. The provisions of ss. 120.535 and 120.543, F.S., are incorporated into the revised s. 120.54, F.S.

1. Requiring a Notice of Development of Proposed Rule

Currently, an agency may, but is not required to, provide a notice of development of a proposed rule. Section 120.54(2)(a) of the committee substitute (page 30, line 3) would require an agency to provide a notice of rule development in the FAW.[24]

The notice of development of a proposed rule would be required to: (1) indicate the subject area to be addressed; (2) provide a short, plain explanation of the purpose and effect of the rule development;[25] (3) cite the specific legal authority for rule development; and (4) include the preliminary text of proposed rules, if available. *This provision was contained in CS/CS/SB 536.*

2. Rule Development Workshop

The committee substitute (page 30, line 20) would not require an agency to hold a public workshop for rule development unless an affected person requests a workshop. Even in such a case, the agency would be permitted to deny the request as long as the agency head explained in

[23] CS/CS/SB 536 encouraged agencies to accomplish their statutory duties and objectives using sound judgment and flexibility so that agency action in implementing legislative enactments and in adopting agency rules would be accomplished in a manner that meets individual needs and circumstances while at the same time carrying out legislative requirements. Agencies also were encouraged to adopt rules that could be applied flexibly.

[24] CS/CS/SB 536 required provision of this notice at least 21 days before providing notice of intent to adopt a rule.

[25] CS/CS/SB 536 also required the notice to state the policy consideration underlying the proposed rule, the major legal issues involved in the rule, and the methodology proposed or used to obtain and analyze data.

writing why a workshop was not necessary. The explanation would not be final agency action which is subject to review.[26]

Additionally, s. 120.54(2)(c) of the committee substitute (page 30, line 20) would require an agency to ensure that the person responsible for preparing the proposed rule is available to explain an agency's proposal and to answer questions when a rule development workshop is scheduled. The committee substitute also would require that notice of rule development be published in the FAW not less than 14 days[27] before the date on which the workshop is scheduled to be held. The committee substitute permits facilitation or mediation of the workshop by a neutral third person. It also permits the use of other types of dispute resolution alternatives. *This section is similar to CS/CS/SB 536.*

3. Negotiated Rulemaking

The committee substitute (page 31, line 12) would authorize negotiated rulemaking. Agencies are directed to consider the use of negotiated rulemaking when a complex rule is being drafted or when there will be strong opposition to a rule. The agency is directed to consider whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule.

If an agency decides to use negotiated rulemaking, it must publish notice in the FAW. The notice must include a list of the representative groups that will be invited to participate. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days of the notice.[28]

All meetings of the negotiating committee must be noticed and open to the public. The negotiating committee must be chaired by a neutral facilitator or mediator. *This section is identical to CS/CS/SB 536.*

4. Requiring Full Rule Text, Summary, and SERC in Notice

[26]CS/CS/SB 536 was silent as to whether an explanation why a workshop is unnecessary was final agency action subject to review.

[27] CS/CS/SB 536 required 21 days notice.

[28] It is not stated whether denial of a request to participate would be final agency action subject to challenge.

Section 120.54(3)(a) of the committee substitute (page 32, line 4 to page 33, line 15) would require an agency to include additional items in a notice of intent to adopt, amend, or repeal a rule. Currently, an agency must include in the notice a short and plain explanation of the purpose and effect of the proposed rule, and the specific legal authority under which its adoption is authorized. The committee substitute, in addition, would require an agency to include the full text of the proposed rule or amendment, and a summary. As well, the notice would be required to include a summary of the agency's statement of estimated regulatory costs (SERC) and to state the procedure for requesting a public hearing on the proposed rule. *This provision is identical to CS/CS/SB 536.*

5. Consideration of Impact on Small Counties and Cities

Section 120.54(3)(b) of the committee substitute (page 33, line 16) would require an agency to consider the impact of a rule on small counties and small cities, in addition to the current requirement to consider the impact on small businesses, before adopting, amending, or repealing a rule. The committee substitute would require an agency to tier its rules to reduce disproportionate impacts on these entities and to avoid regulating these entities if they do not contribute significantly to the problem a rule is designed to address.

Five specific methods for reducing the impact of a proposed rule on small cities and counties would be provided (page 34, lines 13-24), including establishing less-stringent compliance or reporting requirements, establishing less-stringent schedules or deadlines, consolidating or simplifying the rule's compliance or reporting requirements, establishing performance standards to replace design or operational standards, and exempting these entities from any or all requirements of the proposed rule.

In order to effectuate these changes, two new definitions would be added to the APA by Section 3. of the committee substitute (page 17, lines 18-23). The term "small county" would be defined to mean any county that has an unincarcerated population of 50,000 or less according to the most recent decennial census. The term "small city" would be defined to mean any municipality that has an unincarcerated population of 10,000[29] or less according to the most recent decennial census. The committee substitute (page 33, line 23 to page 34, line 12) would authorize an agency to define these terms to include counties with populations greater than 50,000 and cities with populations greater than 10,000 if the agency finds that such a definition is necessary to adapt a rule to the needs and problems of small counties and small businesses.

Section 120.54(3)(b)2. of the committee substitute (page 33, line 23 to page 35, line 13) contains all of the requirements of s. 120.54(2)(a)1.-5., F.S., as well as all of the requirements of s. 120.54(3)(b)1.-3., F.S.[30]

[29] CS/CS/SB 536 defined a small city to be those cities with a population of 1,000 or less.

[30] CS/SB 958 by the Committee on Commerce and Economic Opportunity would delete references to the Small and Minority Business Advocate, the Minority Business Enterprise Assistance Office, and the

6. Statement of Estimated Regulatory Costs

Currently, s. 120.54(2)(b), F.S., permits an agency to provide economic information on its proposed rule action, and requires the provision of economic information under certain circumstances, through preparation of an economic impact statement (EIS). Section 11. of the committee substitute (page 47, line 20) would create s. 120.541 and would authorize a substantially affected person, within 21 days of notice of rule adoption, to submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting a rule.

Upon submission of the lower cost regulatory alternative, the agency would be required to prepare a statement of estimated regulatory costs (SERC) or revise any prior SERC.[31] The agency either must adopt the lower cost alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule. Failure of an agency to prepare or revise the SERC is a material failure to follow applicable rulemaking procedures or requirements.

Subsection (2) of s. 120.541 of the committee substitute (page 49, line 4) would require a SERC to include a good faith estimate of: (1) the number of individuals and entities likely to be required to comply with the rule, together with a general description of what types of individuals the rule is likely to affect; (2) the cost to the agency, and to any other state or local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenue; and (3) the transactional costs likely to by incurred by individuals and entities, including local government, required to comply with the requirements of the rule. The term "transactional costs" would be defined as direct costs that are readily ascertainable based on standard business practice, and would include, filing fees, the cost of obtaining licenses, installing equipment or following procedures required to comply with the rule.

Additionally, a SERC would be required to include: (1) an analysis of the impact on small businesses, counties or cities; (2) any additional information that the agency determines may be useful in informing the regulated public of the costs of rule compliance; (3) a good-faith determination of whether less costly or less intrusive methods exist; and (4) a good-faith description of any reasonable alternative methods, including any proposals submitted by an affected person.

The committee substitute (at page 48, line 16 to page 49, line 3) would provide that no rule could be declared invalid because it imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of a less costly alternative that substantially accomplish

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Division of Economic Development of the Department of Commerce and insert a reference to the Office of Tourism, Trade, and Economic Development.

[31] The CS/CS/SB 536 required an agency to prepare a SERC prior to adopting, amending, or repealing a nonemergency rule.

the statutory objectives. Furthermore, no rule could be declared invalid based upon a challenge to the SERC unless: (1) the issue is raised in an administrative proceeding within 1 year of the effective date of the rule; (2) the substantial interests of the person challenging the agency's rejection of, or failure to consider, the lower cost regulatory alternative are materially affected by the rejection; and (3) the agency has failed to prepare or revise the statement of estimated regulatory costs as required by paragraph (b) or the challenge is to the agency's rejection under paragraph (b) of a lower cost regulatory alternative submitted under paragraph (a).[32] *This section is similar to CS/CS/SB 536.*

7. Additional Rulemaking Record Requirements

Section 120.54(8) of the committee substitute (page 46, line 28) would require an agency to compile a rulemaking record in all rulemaking proceedings. The record would be required to include: (1) all notices given for the proposed rule; (2) the SERC; (3) a written summary of hearings on the proposed rule; (4) written comments and responses to written comments; (5) all notices and findings for emergency rules: (6) all materials filed by an agency with the JAPC; (7) all materials filed with the Department of State; and (8) all written inquiries from standing committees of the Legislature concerning the rule. An agency would be required to retain the record of rulemaking as long as the rule remains in effect. *This section is identical to CS/CS/SB 536.*

8. Notice of Change or No Change to a Rule Required

Section 120.54(3)(d) of the committee substitute (page 36, line 10) would require an agency, if applicable, to file with the JAPC a notice which states that a proposed rule is unchanged from the rule as previously filed with the JAPC or which contains only technical changes made in the proposed rule and the reasons for such changes. This notice would have to be filed after the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, but at least 7 days prior to filing.

Additionally, when any change is made in a proposed rule, other than a technical change, the committee substitute would require (page 36, lines 22-29) the agency to provide a copy of the notice by certified mail or actual delivery to any person who requests it in writing. The agency also would be required to file the notice with JAPC and to persons requesting it, at least 21 days (previously was 7 days) prior to filing the rule for adoption. As well, the agency would be required to publish the notice in the FAW at least 21 days prior to filing the rule for adoption. *This section is identical to CS/CS/SB 536.*

[32] The CS/CS/SB 536 required a challenge to be brought within 1 year of the effective date of the rule to which the SERC applies and required the person challenging the SERC to have provided the agency with information sufficient to make the agency aware of the specific concerns. As well, the challenged statements were required to be material to the person's substantial interests.

9. Postponement of Rule Adoption Process

Subsection (3) of s.120.54 of the committee substitute (page 37, lines 6-11) would be amended to provide that if the JAPC notifies an agency that an objection to a rule is being considered, the agency may postpone the adoption of a rule to accommodate review of the rule by the JAPC. When an agency postpones adoption of a rule to accommodate review by the JAPC, the committee substitute would provide for the tolling of the 90-day period for filing a rule until the JAPC notifies the agency that it has completed its review of the rule. *This provision is identical to CS/CS/SB 536.*

10. Agency and JAPC Certification

Section 120.54(3)(e)3. of the committee substitute (page 38, lines 20-24) would require that, in addition to what an agency currently certifies when it files a rule with the Department of State, the agency also would certify that all statutory requirements have been satisfied.

Section 120.54(3)(e)4. of the committee substitute (page 38, line 25) would require JAPC to certify, at the time a rule is filed, that the agency has responded to all material and timely written comments or written inquiries made on behalf of JAPC. The Department of State would have to reject any rule: (1) that does not satisfy all statutory rulemaking requirements; (2) which an agency has not responded in writing to all material and timely written inquiries or written comments; or (3) which does not include a SERC, if required. *This provision is identical to CS/CS/SB 536.*

D. Rule Challenge Process Changes

1. General Procedures

Section 16. of the committee substitute (page 64, line 27 to page 70, line 12) would amend the procedures for a substantially affected person to seek an administrative determination regarding the invalidity of an adopted or a proposed rule on the grounds that it is an invalid exercise of delegated legislative authority. The failure of an agency to follow applicable rulemaking procedures or requirements would be presumed to be material. The agency, however, could rebut this presumption by showing that the substantial interests of a petitioner and the fairness of the proceedings have not been impaired (page 65, line 27).

2. Proposed Rule Challenges

Section 120.56(2) of the committee substitute (page 66, line 17) would require that a petitioner file a request within 21 days after the date of publication of a notice of intent to adopt, amend or repeal a rule, within 10 days after the final public hearing is held, within 20 days after the preparation of the SERC or, if applicable, within 20 days after filing with the Department of State. The petition would be required to state the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority.

In a proposed rule challenge, the agency must prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised (page 66, line 31). When any substantially affected person seeks a determination of the invalidity of a proposed rule, the proposed rule is not presumed to be valid or invalid (page 67, line 28).[33]

Any person, who is substantially affected by a change in the proposed rule, and thereafter included as a result of the change would be authorized to challenge any provision of the rule.

The proposed rule could be declared wholly or partly invalid. The proposed rule or portion thereof which is declared invalid would be required to be withdrawn by the adopting agency and not be adopted.[34]

3. Existing Rule Challenges

The committee substitute also would amend s. 120.56, F.S. which provides procedures for administrative determination of an adopted rule. Page 68, line 1 would provide that a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.[35]

4. Agency Statements Alleged to Meet the Definition of a Rule, but Not Adopted

Section 120.56(4) of the committee substitute (page 68, line 12) would provide that any person substantially affected by an agency statement could file a challenge to that statement. The petition would be required to include the text of the statement or a description of the statement and must state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure

[33] The CS/CS/SB for 536 provided that when any substantially affected person seeks determination of the invalidity of a proposed rule or an existing rule, the proposed or existing rule is presumed to be neither valid nor invalid. It required the petitioner to state with particularity the objections to the rule and the reasons why the rule was an invalid exercise. The agency had the burden to prove the validity of the rule as to the objections raised. If the agency failed to prove the validity of the proposed or existing rule, the hearing officer would be required to declare the rule invalid.

[34] Fees and costs in proposed and existing rule challenges were affected by CS/CS/SB 536. In cases pursuant to ss. 120.54(4) or 120.56, F.S., where an agency fails to prove the validity of the rule as to the objections raised, the court or hearing officer was required to enter a judgment or order against the agency for costs and reasonable attorney' fees, unless the agency could demonstrate that its actions were substantially justified.

[35] Fees and costs in proposed and existing rule challenges were affected by CS/CS/SB 536. In cases pursuant to ss. 120.54(4) or 120.56, F.S., where an agency fails to prove the validity of the rule as to the objections raised, the court or hearing officer was required to enter a judgment or order against the agency for costs and reasonable attorney' fees, unless the agency could demonstrate that its actions were substantially justified.

provided by s. 120.54. If a hearing is held and the petitioner proves the allegations of the petition, the agency has the burden of proving that rulemaking is not feasible and practicable under s 120 54(1)(a) of the committee substitute.

If a final order is entered which provides that all or part of an agency statement violates s. 120.54(1)(a), the agency would immediately be required to discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action (page 69, line 5).

If an agency publishes, prior to the entry of a final order, proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency would be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if it meets the requirements of s. 120.57(1)(e). If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of the subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules.

Proceedings to determine a violation of s. 120.54(1)(a) would be required to be brought pursuant to the subsection. A proceeding pursuant to the subsection may be brought in conjunction with a proceeding under any other section of the APA, or consolidated with such a proceeding. Nothing in the paragraph is to be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e) of the committee substitute.

Section 120.57(1)(e)1. of the committee substitute would provide that any agency action that determines the substantial interests of a party and that is not based on an adopted rule is subject to de novo review. The agency action is not presumed valid or invalid. The agency must demonstrate that the statement: (a) is within the powers, function, and duties delegated by the Legislature or, if the agency is operating pursuant to authority from the State Constitution, is acting within that authority; (b) does not enlarge, modify, or contravene the specific provisions of law implement; (c) is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency; (d) is not arbitrary or capricious; (e) is not being applied retroactively without due notice; (f) is supported by competent and substantial evidence; and (g) does not impose excessive regulatory costs on the regulated person, county, or city.

Under paragraph 3. (page 78, line 3) the determination regarding the unadopted rule shall not be rejected by an agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that the determination is clearly erroneous or does not comply with essential requirements of law. If a reviewing court finds that the agency's rejection of the determination does not comport with the paragraph, the agency action will be set aside and the court must award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding, and the proceeding for judicial review.[36]

[36] The CS/CS/SB 536 provided that subsequent to a hearing officer's determination that an agency's statement (unadopted policy) violates s. 120.547(2), in that it should have been promulgated as a rule, if an agency relies upon the statement or one substantially similar, a person whose substantial interests are

5. Emergency Rules

Section 120.54(5) of the committee substitute (page 70, line 3) would outline separate time schedules for challenging emergency rules.

E. Invalid Exercise of Delegated Legislative Authority

Page 11, line 29 to page 13, line 6 would amend the definition of the term "invalid exercise of delegated legislative authority." The term would be amended to provide that an agency may adopt or apply only rules that implement, interpret, or make specific the powers and duties granted by the enabling statute. The definition would prohibit an agency from adopting rules that implement statutory provisions setting forth general legislative intent. As well, the committee substitute would add paragraphs (f) and (g) at page 12, line 17. Paragraph (f) would provide that rule is invalid if not supported by competent substantial evidence. Paragraph (g) would provide that a rule is invalid if it imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.[37] Finally, a change in a reference would be made from s. 120.54(7), F.S., to s. 120.54(3)(a)1., of the committee substitute. Section 120.54(3)(a)1. of the committee substitute would contain the same requirements of s.120.54(7), F.S.

F. Attorney's Fees

Section 120.595 of the committee substitute would regulate attorney's fees under the APA. It would be divided into five sections.

1. Challenges to Agency Action Pursuant to S. 120.57(1), F.S.

Section 120.57(1) of the committee substitute (page 76, line 1) provides procedure for hearings involving disputed issues of material fact. Section 120.595(1) of the committee substitute (page 89, line 18) would regulate attorney's fees for this type of action. The provisions of the section are supplemental to other provisions allowing the award of attorney's fees and costs.

Section 120.595(1)(b) of the committee substitute (page 89, line 24) would authorize the award of costs and reasonable attorney's fees to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose. "Improper purpose" is defined to mean participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

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determined by the agency action, is entitled to payment of reasonable costs and attorney's fees. The award was required to be paid from the agency's budget.

[37] The CS/CS/SB 536 did not specifically refer to the regulated person, county, or city, and also modified the term "regulatory costs" with the word "excessive."

2. Challenges to Proposed Agency Rules

Section 120.595(2) of the committee substitute (page 91, lines 10-27) provides the standard for attorney's fees in cases challenging proposed rules. The section would provide that where a proposed rule or portion thereof is found to be invalid, a judgment or order must be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust.

The section would define an agency's action to be "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.[38]

If an agency prevails in the proceedings, the court or administrative law judge would be authorized to award reasonable costs and reasonable attorney's fees against a party if it is determined that a party participated in the proceedings for an improper purpose as defined in s. 120.595(1)(e) of the committee substitute. However, attorney's fees would be limited to $15,000.

3. Challenges to Existing Agency Rules

Section 120.595(3) of the committee substitute (page 91, line 28 to page 92, line 13) provides the standard for attorney's fees in cases challenging existing rules. The section would require the award of reasonable costs and reasonable attorney's fees if a rule or portion thereof is declared invalid unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. As in challenges to proposed agency rules, an agency's action is substantially justified if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

If the agency prevails, the reasonable costs and reasonable attorney's fees would be awarded against a party if it is determined that a party participated in the proceedings for an improper purpose.

4. Challenges to Agency Statements Defined as Rules

Section 120.595(4) of the committee substitute (page 92, lines 14-25) would award reasonable costs and attorney's fees to the petitioner under challenges to agency statements which are determined to be unpromulgated rules. The award would be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency. The agency would not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

5. Attorney's Fees in Appeals

[38]The CS/CS/SB 536 did not define this term.

Section 120.595(5) of the committee substitute (page 92, line 26) regulates attorney's fees for appeals. The court, in its discretion, may award reasonable attorney's fees and costs to the prevailing party if it finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. If the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court must award reasonable attorney's fees and costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

G. Florida Administrative Code and Florida Administrative Weekly

Section 15. of the committee substitute (page 60, line 6) provides requirements related to the publication of the FAW and FAC. Changes to references are made to reflect other changes which would be made by the committee substitute.

As well, s. 120.55(1)(a)3., F.S. (page 61, lines 1-11), would be amended to: (1) require the Department of State to publish the address and telephone number of the executive officer of each agency in the FAC; and (2) delete a requirement that the Department of State also publish any exemptions granted to an agency pursuant to s. 120.63, F.S.[39] Likewise, the committee substitute would delete s. 120.55(1)(b)5., F.S., which requires the Department of State to include in the FAW a notice of each request for exemption from any provision of the APA.

1. Contracting Requirements for Florida Administrative Code

Section 15. of the committee substitute (page 61, line 10) would amend s. 120.55(1)(a)1., F.S., which regulates publication of the Florida Administrative Code (FAC). Currently, the Department of State is required to contract with a publishing firm for the publication of the FAC. The committee substitute would remove the requirement that the department contract with a publishing firm, and instead authorize it to do so. *This provision is identical to CS/CS/SB 536.*

2. Copyright of FAC

Section 15. of the committee substitute (page 60, lines 22 and 23) would authorize the Department of State to retain the copyright over the text of the FAC. *This provision is identical to CS/CS/SB 536.*

3. Copies of FAW

Section 15. of the committee substitute (page 63, lines 22 and 23) would eliminate the requirement that the Senate President and Speaker of the House must request that each state

[39] Section 120.63, F.S., provides the method for obtaining from the Administration Commission an exemption from any process or proceeding governed by the APA.

legislator receive a copy of the Florida Administrative Weekly (FAW) and would require that the department furnish a copy to each legislator. *This provision is identical to CS/CS/SB 536.*

4. Publication Revolving Trust Fund

Section 15. of the committee substitute (page 64, line 16) would provide that the unencumbered balance in the Publication Revolving Trust Fund at the beginning of each fiscal year could not exceed $300,000. Currently, the unencumbered balance may not exceed $100,000. *This provision is identical to CS/CS/SB 536.*

H. General and Agency Specific Exceptions

1. Agency Specific Exceptions

Section 120.80 of the committee substitute (page 107, line 28 to page 116, line 31) would provide a single location within the APA for specific agency exceptions from provisions of the act. Specific agency exceptions which now are located throughout the APA would be contained in one section.

2. General Exceptions

Section 120.81 of the committee substitute (page 117, line 1 to page 122, line 26) would provide a single location within the APA for general exemptions from provisions of the act. General exemptions which now are located throughout the APA would be contained in one section.

I. Other

1. "Agency" Redefined

Section 3. of the committee substitute (page 6, lines 6-30) would amend the definition of "agency" which is contained in s. 120.52(1)(b), F.S. The committee substitute would include the Commission on Ethics and the Game and Fresh Water Fish Commission within the definition of an agency ". . . when acting pursuant to statutory or other authority derived from the Legislature." As well, the description of "district" within paragraph (b) would be changed to read: "multi-county special district with a majority of its governing board comprised of non-elected persons." *This provision is identical to CS/CS/SB 536.*

Also included in the definition of "agency" (page 10, lines 19-22) would be any legal or administrative entity created by an interlocal agreement pursuant to s.163.01(7), F.S., unless any party to such agreement is otherwise an agency as defined in this subsection. *This provision is identical to CS/CS/SB 536.*

2. Consolidation of Cases

Section 35. of the committee substitute (page 103, line 16 to page 104, line 8) would amend s. 120.68(2), F.S. The committee substitute would provide that when proceedings under ch. 120,

F.S., are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, a court of appeal is authorized to transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts. *This provision is identical to CS/CS/SB 536.*

3. Modification of Findings of Fact

Section 35. of the committee substitute (page 104, line 9) would require a reviewing court to remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that: (a) there has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts; (b) the agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record; however, the court is not permitted to substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact; (c) the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure; (d) the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or (e) the agency exercise of discretion was outside the range of discretion delegated, inconsistent with agency rule or policy or in violation of a statute or the constitution. The court is not permitted to substitute its judgment for that of the agency on an issue of discretion.

Subsection (10) of the section (page 106, line 26) would provide that if the administrative order depends on any fact found by the administrative law judge, the court cannot substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court, however, must set aside the final order or remand the case, if it finds that the final order depends on any finding of act that is not supported by competent substantial evidence in the record. *This provision is the same as CS/CS/SB 536.*

4. Mediation of Disputes

The committee substitute would create s. 120.573 (page 85, lines 1-28). The section would provide that each announcement of an agency action that affects substantial interests must advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing.

Mediation would be required to be concluded within 60 days of the agreement to mediate, unless otherwise agreed by the parties. If mediation terminates without settlement of the dispute, the agency must notify the parties in writing that administrative hearing processes remain available.

5. Administrative Law Judges

The committee substitute (page 97, line 20) would amend s. 120.65, F.S., to change the title "hearing officer" to "administrative law judge." *This provision was not in CS/CS/SB 536.*

The committee substitute would delete authorization for the director of DOAH to designate qualified laypersons to conduct hearings.

6. Summary Hearing

Section 120.574 of the committee substitute (page 85, line 29) would authorize a summary hearing. Under the section, the DOAH would be required to serve on all original parties an initial order that assign the case within 5 business days of receipt of the petition. Within 15 days of service, any party may file with the division a motion for summary hearing. If all original parties agree, the proceeding must be conducted within 30 days of the agreement.

The section would provide special procedures for a summary hearing. Motions would be limited; time frames shortened; and limitations would be placed on what is to be included in the record.

The division would be required to maintain a register of the total number of formal proceedings filed with the division.

7. Uniform Rules of Procedure

Section 120.54(5) of the committee substitute (page 41, line 3) provides for the adoption of uniform rules of procedure. The provisions of the section currently are contained in ss. 120.53(5)(f) and 120.54(10), F.S. As well, the provisions of the section currently are contained in s. 120.53(6), F.S., though the committee substitute would require the Administration Commission (instead of each state agency as is currently required) to adopt uniform rules which provide a procedure for conducting meetings, hearings, and workshops, and for taking evidence, testimony, and argument.

Additionally, s. 120.54(5)(b)5. of the committee substitute would require the uniform rules to ". . . provide a method by which each agency head will provide a description of the agency's organization and general course." This requirement is in place of s. 120.53(1)(a), F.S., which would be deleted by the committee substitute.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The bill could affect the Florida Public Service Regulatory Trust Fund, which is created by s. 350.113, F.S., within the Public Service Commission (PSC). The trust fund could be negatively affected by costs of additional person-hours which would be required to implement certain required provisions of the bill and because of the potential for payment of costs and attorney's fees. The PSC cannot predict exact costs. However, as the operations of the PSC are funded by fees, licenses, and other charges collected from utilities regulated by the PSC and deposited into the Florida Public Service Regulatory Trust Fund, if the operational costs to the PSC rise, then the fees charged to regulated entities might need to be increased.

As well, the Department of Banking and Finance reports that the bill could result in additional administrative costs to the agency which might need to be defrayed by increases in fees associated with applications, registrations, or licenses.

The Commission on Ethics notes that the bill could indirectly impact fees for lobbyist registration if operational costs were to rise as a result of the bill.

B. Private Sector Impact:

If, as several agencies report, costs rise for agencies due to additional notice requirements and potential attorney's fees and costs being assessed against agencies, some regulated individuals ultimately may be required to pay more for fees and licenses.

On the other hand, attorneys could be compensated by attorney's fees and costs which were not provided prior to the bill.

As the Department of State would no longer be required to contract with a company to provide for the publishing of the FAC, the company which presently publishes the FAC could be impacted negatively if the department determines to publish the FAC itself.

C. Government Sector Impact:

The JAPC would be required to undertake and maintain a systematic review of statutes that authorize agencies to adopt rules and to make recommendations to appropriate standing committees as to the advisability of considering changes to delegated legislative authority to adopt rules in specific circumstances. This section is likely to require additional staffing at JAPC.

The bill would require an agency to provide notice of the development of proposed rules. As agencies are not required to provide such notice at present, additional publication costs will be incurred.

The bill would require an agency to consider the impact of a rule on small counties and small cities. Responding agencies report that some additional operational costs likely would result from additional personnel who may be needed to analyze the effect of proposed rules on small counties and small cities.

To the extent that agencies reduce the impact of rules on small counties and cities, local governments would benefit.

The bill would increase, from $100,000 to $300,000, the carry-over balance in the Publication Revolving Trust Fund at the end of each fiscal year. Since the law requires the Department of State to support the publication of the FAW from advertising and subscription fees, this increase would allow the department to comply with the law, since all of its subscriptions do not end with the fiscal year.

Agencies could be negatively impacted by provisions in the bill which require the award of attorney's fees and costs.

The Department of State reports that, while it could expect an increase in revenue because agencies would be required to publish additional notices in the FAW, the Publications Revolving Trust Fund could be negatively impacted by $352,743 in FY 1996-97 and $352,743 in FY 1997-98.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill would authorize the Department of State to hold copyrights to the text of the FAC and enforce its rights with respect to those copyrights. Copyrights may be held on the organization, arrangement, pagination, and annotations which would make such work the product of some creative intellectual or aesthetic labor. For example, copyright protection extends to the organization, pagination, and the key system of annotation which West Publishing Company has created in its volumes of judicial opinions. Protection does not, however, extend to the cases themselves. Similarly, the Department of State would be authorized to copyright the Florida Administrative Code, which includes the organization, pagination, and annotation of administrative rules, as well as indexes and historical summaries. Copyright protection would not extend to the rules perse, however.

VIII. Amendments:

None.